In the Supreme Court of the United States

OCTOBER TERM, 1966

No.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

SASKATCHEWAN MINERALS (SODIUM SULPHATE DIVISION)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion (App. A, *infra*, pp. 9–17) and supplemental opinion (App. C, *infra*, pp. 20–21) of the district court are reported at 253 F. Supp. 504. The report of the Interstate Commerce Commission (App. E, *infra*, pp. 24–43 [1]) is printed at 325 I.C.C. 621.

JURISDICTION

This action was originally brought under 28 U.S.C. 1336, 1398, 2284 and 2321–2325 to set aside an order

[1] There was no formal printed record in the court below. We have therefore printed the Commission's report in an appendix hereto.

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of the Interstate Commerce Commission. The amended judgment of the three-judge district court (App. D, *infra*, pp. 22–23) setting aside the Commission's order was entered on April 6, 1966. The United States and the Interstate Commerce Commission filed a notice of appeal on June 6, 1966. The jurisdiction of this Court to review the judgment of the district court on direct appeal is conferred by 28 U.S.C. 1253 and 2101(b). *Southern Ry. Co.* v. *State of North Carolina*, 376 U.S. 93; *American Trucking Associations* v. *United States*, 364 U.S. 1.

STATUTE INVOLVED

Section 3(1) of the Interstate Commerce Act, 49 U.S.C. 3(1), provides:

> It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

QUESTION PRESENTED

The Interstate Commerce Commission found that shipments of salt cake from California to points in Oregon and Washington did not enjoy an "undue or unreasonable preference or advantage" in rail rates over salt cake shipped to the same points from Saskatchewan. The district court set aside the Commission's order and dismissed the complaint on the ground that the order was not supported by substantial evidence, and remanded the case to the Commission with an explicit direction to grant the complaining shipper appropriate relief. The question presented is whether the district court by this form of order improperly precluded the Commission from further consideration of the substantive merits of the charge of undue or unreasonable preference or prejudice.

STATEMENT

Appellee filed a complaint before the Interstate Commerce Commission under Section 13(1) of the Interstate Commerce Act, 49 U.S.C. 13(1), charging that existing international rail rates on salt cake from certain points in California to specific points in Oregon and Washington were unreasonably preferential, in violation of Section 3(1) of the Interstate Commerce Act, 49 U.S.C. 3(1), as compared with rates on the same commodity shipped from Chaplin, Saskatchewan to the same destinations. The complaint sought no reparations, but only an order requiring for the future that comparable rates for shipping salt cake by rail from Saskatchewan and from California be maintained. The Commission, after hear-

ings, ruled that the lower rates on salt cake shipped from California did not result in undue preference or prejudice, because they were established to meet competition from water transportation and there was no comparable water competition for shipments of salt cake from Chaplin (App. E, *infra*, pp. 25, 42–43).

Appellee brought this action to set aside the Commission's order. The three-judge district court held that there was "no substantial evidence" (App. A, *infra*, p. 14) to support the Commission's finding that the railroads shipping salt cake from California faced any real competition from water transportation. At the court's instruction, appellee submitted a proposed order remanding the matter to the Commission with instructions to "grant to the plaintiff relief, in alternative form, pursuant to Section 3(1)." Appellants objected to this restrictive language and proposed an order remanding to the Commission for further proceedings consistent with the opinion of the court.

On January 27, 1966, the district court entered judgment (App. B, *infra*, pp. 18–19) providing that the Commission's orders

> * * * be, and they are hereby, set aside, and that the proceedings be remanded to the Commission for further proceedings with instructions to grant relief to the plaintiff in accordance with the opinion heretofore entered by this court.

The United States and the Interstate Commerce Commission moved for amendment of the judgment, asking that the court make clear whether it intended to remove the Commission's discretion to take additional evidence on the question of whether the rate differential

was lawful. In response, the court filed a supplemental opinion (App. C, *infra*, p. 20), stating that:

> It is the intention of this court that the Interstate Commerce Commission be free under said judgment to open the proceedings for the receipt of additional evidence limited, however, to the nature of the relief to be granted to the plaintiff. It is not intended that the Commission receive additional evidence on the right of the plaintiff to be granted such relief.[2]

THE QUESTION IS SUBSTANTIAL

The court below held that the Commission erred in finding that the rate differential was justified by competitive conditions, and accordingly set aside the Commission's order of dismissal. We do not challenge this determination here. But the court went on to provide that, on remand, the Commission was not to consider further the substantive issue whether the rates were lawful, but was to assume they were not and limit itself to issues of relief. The restriction upon the remand was manifestly improper.

It is settled law that "an administrative determination in which is imbedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge" (*Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 145) and hence that "[a]fter the remand was

[2] The district court's amended judgment (App. D, *infra*, p. 23) ordered the matter "remanded to the Commission for further proceedings with instructions to grant relief to the plaintiff * * *."

made * * * the Commission was bound to deal with the problem afresh, performing the function delegated to it by Congress" (*Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 201). The reviewing court's function "ends when an error of law is laid bare. At that point the matter once more goes to the Commission for reconsideration." *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17, 20. This precept is particularly apt in the context of ICC rate orders for the future, for surely the public interest in a sound rate structure, and the almost legislative breadth of discretion that must be allowed the agency responsible for rate regulation, require that the Commission—and not the reviewing court—decide whether a further proceeding, purged of the error exposed by the court, is necessary.

We do not advance this as an unqualified absolute. We recognize that the courts retain power to prevent abuses. If on remand an agency ignored the reviewing court's mandate, on a second review the court could doubtless make an order sharply limiting the further course of agency proceedings. No such situation is here alleged. The court merely found that the Commission had based its decision upon insufficient evidence. This finding should not foreclose further Commission proceedings to determine whether in fact there has been a violation of Section 3(1).

The present case is thus like *Arrow Co.* v. *Cincinnati, N.O. & T.P.R.*, 379 U.S. 642. There, the district court had "set aside and permanently enjoined the operation, enforcement and execution" of a Commission

order under Section 3(1) cancelling certain rate reductions. This Court did not disturb the ruling on the merits. However, it summarily set aside the permanent injunction and ordered the matter remanded to the Commission without any restriction upon its power to re-examine the issues. We believe that the same course would be proper here.

CONCLUSION

The judgment of the district court should be vacated insofar as it precludes the Commission from reconsideration of any of the issues of the case.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

DONALD F. TURNER,
Assistant Attorney General.

HOWARD E. SHAPIRO,
THOMAS R. ASHER,
Attorneys.

ROBERT W. GINNANE,
General Counsel,

FRITZ R. KAHN,
Associate General Counsel,

BETTY JO CHRISTIAN,
Attorney,
Interstate Commerce Commission.

SEPTEMBER 1966.

APPENDIX A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

(Civil No. 6415)

SASKATCHEWAN MINERALS (SODIUM SULPHATE DIVISION), PLAINTIFF

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

OPINION

Before: FREDERICK G. HAMLEY, Circuit Judge, and WILLIAM J. LINDBERG and WILLIAM T. BEEKS, District Judges

This is a proceeding under 28 U.S.C. § 2321 for review of an order of the Interstate Commerce Commission, Division No. 2, which dismissed the complaint filed herein.

Petitioner, Saskatchewan Minerals, Sodium Sulphate Division, is a Crown corporation organized under the laws of the Province of Saskatchewan, Canada. Its place of business is at Chaplin, Saskatchewan and it engages in the production and sale of natural sodium sulphate, more commonly referred to as salt cake. The subject of this review is an order of the Commission denying petitioner relief under 49 U.S.C. § 3(1) [1] relative to alleged

[1] "It shall be unlawful for any common carrier subject to the provisions of this chapter to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port,

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unduly prejudicial, preferential, unreasonable and unjust all-rail joint through rates for salt cake from Chaplin to particular points in Washington and Oregon.

Intervening defendant railroads are involved in the transportation of salt cake either from Chaplin, Saskatchewan or from points in California to certain Washington and Oregon destinations. Intervening defendants American Potash & Chemical Corporation and Stauffer Chemical Company, located at Trona and Westend, California, respectively, are petitioner's major competitors for the Pacific Northwest salt cake market.

All bulk salt cake shipments from California and from Chaplain to the destination points in question have moved and now move by rail only. There have been no movements to those points by truck or water in the past 20 years. Petitioner's plant at Chaplin, Saskatchewan is north of the State of Montana and approximately 1,000 miles from Vancouver, British Columbia. Stauffer, at Westend, California, and American Potash, at Trona, California, are in such close proximity to each other that they may be considered as having a common origin point for the purposes of this case. They are located approximately 200 miles from tidewater at Long Beach Harbor, California. Both firms ship via the Troma Railway Company to the connecting Southern Pacific Company line which transports the product to Portland, Oregon from where it is transferred by other railroads to des-

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port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

tination. Most of the salt cake shipped into the Washington-Oregon area is used in the kraft pulp industry and the balance is used in the manufacturing of glass.

Virtually all of the salt cake traffic moves in shipper-supplied "jumbo hopper" rail cars at minimum 170,000 pound incentive rates. The record shows that to points which are substantially equidistant from Chaplin and Trona the all-rail rates for such shipments favor the California shippers by $0.11 per 100 pounds or $2.20 per ton. Intervenors sought to justify the rate disparity on the basis of actual or threatened competition by water carriers from Long Beach Harbor, California to points on the Columbia River and Puget Sound in the States of Washington and Oregon.

It is not disputed that the Commission is empowered to prevent undue prejudice to Canadian shippers caused by a disparity in rates for transportation of the character herein involved.[2] Thus, relief under § 3(1) is available to petitioner in the form of an alternative order requiring the railroads either to reduce the Chaplin rates to the level of the Trona rates or to increase the Trona rates to the level of the Chaplin rates. The issue on this review is whether the Commission properly denied such relief.

The Hearing Examiner, in his recommended report and order which was adopted by the Commission, found, and this Court agrees, that the all-rail rates from Trona at the commencement of salt cake movement in 1933 were depressed by the availability of water carrier transportation between California and Pacific Northwest ports which flourished until the

[2] *Consolidated Mining & S. Co. of Canada* v. *N.Y.C.R. Co.*, 299 I.C.C. 231; *Thermoid Co., Southern Division* v. *Baltimore & O.R. Co.*, 303 I.C.C. 743.

advent of World War II. Since that time such water carriage on the Pacific Coast has been dying by degrees and we take judicial notice of the fact that at the present time it has almost ceased to exist. Whether enough remains to justify the rate disparity in question is the crux of this dispute. The Examiner concluded that:

> "The defendants have proved that the influence and compulsion exerted by the coastwise waterway has depressed the level of the all-rail rates from the California origins to the Pacific Northwest destinations."

Three issues are presented on this appeal. All deal with the question of water competition. It is contended, first, that the Examiner committed an error of law in failing to consider the character and extent of water competition; second, that if he did consider the character and extent of water competition his conclusion was erroneous as a matter of law; third, that his findings of the cost of water transportation are not based on substantial evidence.

Petitioner's first contention is that the Examiner erroneously held as a matter of law that "the existence of water competition at one point, and its absence at the other, creates a substantial dissimilarity of circumstances" which justifies the rate disparity. Petitioner relies in this regard on *Atchison, Topeka & Santa Fe Ry. Co.* v. *United States,* 218 F. Supp. 359, 367 (N.D. Ill. 1963), in which it is said: "the mere fact of competition alone does not necessarily justify a rate preference or prejudice; the character and extent of the competition may be such as not to warrant the disparity." Although we are in accord,[3] a perusal

[3] This authority refutes the contention made on oral argument by counsel speaking on behalf of the railroads that the mere existence of the Pacific Ocean as a possible water route for the California salt cake justifies the rate disparity.

of the Examiner's report convinces us that he did consider the "character and extent" of water competition in his determination that there was a "substantial dissimilarity of circumstances."

The Examiner made specific findings as to the character and extent of water competition. He found that "no water service can compete with the present rail rates," but if the railroads choose to increase the Trona rates to the level of the present Chaplin rates, as they have the right to do under an alternative order, "there would be an *opportunity* for competing water carriage" and "a *possibility*" of the "transportation of salt cake by water from the California origins to almost all destinations involved."

Petitioner next contends that as a matter of law a "possibility" of water movement is too speculative and uncertain to constitute competition in justification of the disparity between the Chaplin and Trona rates. In argument as to the appropriate standard of certainty of future water movement of salt cake if the Trona rates are adjusted, both sides cite the case of *Rags and Paper to Newark, N.Y.*, 208 I.C.C. 327 (1935). Although this was a case arising under 49 U.S.C. § 4, it was relied upon by the Commission in the Section 3(1) case of *Abingdon Sanitary Mfg. Co.* v. *Chicago, B. & O.R.*, 256 I.C.C. 281 (1943). Petitioner quotes from *Rags and Paper* as follows:

> "The essential elements of competition are all present when a going water carrier has made a *bona fide* offer to perform a competitive service and is ready, willing and able to carry the traffic if the offer is accepted, especially if every facility for the performance of that service is at hand."

Interveners seek to limit *Rags and Paper* to its particular facts, but we find that the above-quoted elements define a standard of competition which is not

only just and reasonable but which is peculiarly applicable to the facts of this case. Measured by this standard the position of the petitioner must be sustained. There is no substantial evidence that any water carrier is ready, willing and able to carry salt cake to the Pacific Northwest, nor that the requisite facilities for such service are at hand.

In *Rags and Paper* competition in a commercial sense is defined as "the independent endeavor of two or more persons to obtain the business patronage of a third by offering more advantageous terms as an inducement to secure trade." Thus, there can be no water competition sufficient to justify the discrimination complained of unless there is substantial evidence demonstrating that Pacific Coast water carriage can offer equal or more advantageous terms than an upward adjusted all-rail rate from Trona.

The Examiner found the "possible" range of cost per ton of future water transportation from Trona to be as follows:

	Minimum	Maximum
1. Rail or motor carrier transportation from Trona to Long Beach Harbor	$3.70	$4.00
2. Stevedoring and wharfage at Long Beach	1.34	1.35
3. Barge transportation to Pacific Northwest	3.44	5.75
4. Insurance	.085	.33
5. Unloading costs	1.31	1.38
6. Terminal handling cost	3.00	3.00
7. Truck delivery to customer	.98	1.86
	13.81	16.54

An upward adjusted Trona rail rate would be $15.40 per ton, which is above the minimum water rate projected by the Examiner. It therefore remains to review the record in support of the Examiner's projection.

We find that four of the minimum cost items of the Examiner's projection are not supported by substantial evidence.

The minimum cost of rail or motor transportation from Trona to Long Beach Harbor was found to be $3.70. This is based on the present rate on salt cake and similar commodities for export. The only evidence in the record that this rate could be obtained as part of a domestic intercoastal water movement are statements by Stauffer and American Potash & Chemical traffic managers that such a rate "is feasible" and that the witnesses "feel certain" their companies "could persuade" the railroads to "seriously consider" establishing such a rate. Such patent speculation cannot rise to the dignity of evidence.

The $3.44 barge rate is based on Stauffer's average cost of water transport of salt cake to Nanaimo, British Columbia in a foreign bottom. Although on oral argument counsel for intervenors insisted that this was a barge operation, Stauffer's traffic manager testified on cross-examination that the movements were by steamship. It was admitted that the vessels are of foreign registry and cannot be used for intercoastal domestic shipments.[4] There is no evidence whatsoever to establish that a domestic barge rate would be comparable as the Examiner fallaciously assumed. For ought that appears in the record these could be occasional tramp steamers which would otherwise be making a run to British Columbia ports in ballast for the purpose of lifting a cargo, with no necessity of developing a backhaul and with respect to which any rate in excess of cost and detention would return a profit.

Stauffer witnesses also testified to a quotation by Pacific Inland Navigation Company, Inc. of $3.25 to Portland and $4.25 to Seattle. On cross-examination it was established that this was only a prelimi-

[4] 46 U.S.C. § 883, the so-called Jones Act, which prohibits transportation of merchandise between points in the United States in foreign vessels.

nary estimate and was conditioned upon Pacific Inland obtaining a southbound backhaul—which we assume to mean a profitable backhaul. The witness admitted that he had no control over the availability of such a backhaul and the record is silent with respect to the certainty, quantity, feasibility, profitability, or regularity of such a backhaul. Presumably a rate without a backhaul would of necessity be almost double the rate quoted. American Potash received a quotation for a barge haul from the same operator of $3.75 to Portland and $4.25 to Seattle. This likewise was not a firm commitment and was conditioned on the satisfactory completion of other negotiations for a steady southbound cargo. There can be no showing that water transportation can offer more advantageous terms when the terms themselves cannot be established by competent evidence.

The record is also devoid of evidence as to which of the many forms of marine insurance could be obtained for the cost projected by the Examiner. Nor does it appear whether such rate applies at any season of the year or only a summer movement, it being well known that numerous substantial barge casualties occur annually in the off-summer months on Pacific Northwest coastal waters.

One of the alternatives proposed by intervenors was the establishment of a central terminal facility at Vancouver, Washington to receive the bargeload deliveries of salt cake. The Examiner based his cost projections on transportation through such a facility. However, in doing so he used Stauffer's experience at Nahaimo for terminal handling costs and for costs of truck delivery from the terminal to the customer. In respect to terminal handling costs this approach fallaciously assumes without supporting evidence that such costs at a United States facility yet to be established would be comparable to the Canadian

costs. Furthermore, the Examiner failed to take into account the capital outlay required to establish such a facility, the cost of which must ultimately be borne either directly or indirectly by salt cake customers. The fallacy is yet more patent in respect to the projected trucking cost from the Vancouver terminal to the customer. American Potash's traffic manager testified that they had been quoted motor carrier rates of $1.60 and $3.20 per ton to two of the closer customers to Vancouver. This is substantially in excess of the range of $0.93 to $1.86 used by the Examiner.

The very minimum cost of water transportation which can be supported by the record is *in excess of* $15.99 to Vancouver, Washington, and $16.49 to Puget Sound. An upward adjusted all-rail rate from Trona would be $15.40. It is therefore clear that water transportation cannot offer terms more advantageous than the rail rates in question.

The intercoastal movement by which the rate disparity is sought to be justified is based on a phantom fleet operating to non-existent terminals at illusory costs.

The order appealed from is set aside and the matter remanded to the Interstate Commerce Commission for further proceedings in accordance herewith.

Plaintiff's counsel shall prepare a form of order in conformity with this opinion for presentation to the Court upon ten days notice to all adverse parties.

Dated this 8th day of December, 1965.

[s] FREDERICK G. HAMLEY,
United States Circuit Judge.

[s] WILLIAM J. LINDBERG,
United States District Judge.

[s] W. T. BEEKS,
United States District Judge.

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APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

Civil Action No. 6415

SASKATCHEWAN MINERALS (SODIUM SULPHATE DIVISION), A CROWN CORPORATION, PLAINTIFF

v.

THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION, DEFENDANTS

JUDGMENT

This action having come on for hearing on November 19, 1965, before this duly constituted three-judge District Court, and the court having entered its opinion on December 8, 1965, finding that the orders of the Interstate Commerce Commission complained of should be set aside and the matter remanded to said commission for further proceedings;

IT IS THEREFORE ORDERED, ADJUDGED and DECREED that the orders of the Interstate Commerce Commission entered in its Docket No. 34220, *Saskatchewan Minerals (Sodium Sulphate Division)* v. *Chicago, Milwaukee, St. Paul and Pacific Railroad Co. et al.*, be, and they are hereby, set aside, and that the proceedings be remanded to the Commission for further pro-

ceedings with instructions to grant relief to the plaintiff in accordance with the opinion heretofore entered by this court.

Dated this 27th day of January, 1966.

FREDERICK G. HAMLEY,
United States Circuit Judge.

WILLIAM J. LINDBERG,
United States District Judge.

WILLIAM T. BEEKS,
United States District Judge.

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

Civil No. 6415

SASKATCHEWAN MINERALS (SODIUM SULPHATE DIVISION), A CROWN CORPORATION, PLAINTIFF

v.

THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION, DEFENDANTS

SUPPLEMENTAL MEMORANDUM DECISION

Counsel for the United States and the Interstate Commerce Commission have filed a motion for amendment of judgment in order to clarify the scope of the mandate upon remand to the Interstate Commerce Commission.

It is the intention of this court that the Interstate Commerce Commission be free under said judgment to open the proceedings for the receipt of additional evidence limited, however, to the nature of the relief to be granted to the plaintiff. It is not intended that the Commission receive additional evidence on the right of the plaintiff to be granted such relief.

An amended judgment in accordance with this

decision shall be presented by counsel for plaintiffs on or before April 1, 1966.

Dated this 3d day of March, 1966.

FREDERICK G. HAMLEY,
United States Circuit Judge.

WILLIAM J. LINDBERG,
United States District Judge.

WILLIAM T. BEEKS,
United States District Judge.

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

No. 6415

SASKATCHEWAN MINERALS (SODIUM SULPHATE DIVISION), A CROWN CORPORATION, PLAINTIFF

v.

THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION, DEFENDANTS

AMENDED JUDGMENT

THIS ACTION having come on for hearing on November 19, 1965, before this duly constituted three-judge District Court; and the court having entered its opinion on December 8, 1965, finding that the Orders of the Interstate Commerce Commission complained of should be set aside and the matter remanded to said Commission for further proceedings; and the court having entered its Judgment on the 27th day of January, 1966; and the United States of America and the Interstate Commerce Commission having filed Motions for amendment of Judgment in order to clarify the scope of the mandate upon remand to the Interstate Commerce Commission; and the court having entered its Supplemental Memorandum Decision on March 3, 1966; now, therefore,

IT IS ORDERED, ADJUDGED and DECREED that the Orders of the Interstate Commerce Commission entered in its Docket No. 34220, Saskatchewan Minerals (Sodium

Sulphate Division) v. Chicago, Milwaukee, St. Paul and Pacific Railroad Company, et al., be and they are hereby set aside, and that the proceedings be remanded to the Commission for further proceedings with instructions to grant relief to the plaintiff in accordance with the opinion heretofore entered by this court on December 8, 1965, and the Supplemental Memorandum Decision entered by this Court on March 3, 1966.

Dated this 6th day of April, 1966.

FREDERICK G. HAMLEY,
United States Circuit Judge.

WILLIAM J. LINDBERG,
United States District Judge.

W. T. BEEKS,
United States District Judge.

Presented by:

ROBERT O. BERESFORD,
ROBERT BARONSKY,
Of Beresford & Booth,
Attorneys for Plaintiff.

APPENDIX E

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2, *Commissioners Freas, Tucker, and Tierney,* (Commissioner Freas did not participate) held at its office in Washington, D.C., on the 7th day of October, A.D. 1964

No. 34220

SASKATCHEWAN MINERALS (SODIUM SULPHATE DIVISION)

v.

CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY ET AL.

DECISION AND ORDER

Upon consideration of the record in the above-entitled proceeding, including the recommended report and order of the examiner, of the exceptions thereto filed by the complainant, and the replies thereto filed by the defendants and their supporting intervenors; and

It appearing, That the exceptions and replies raise no new or material matters of fact or law not adequately considered and properly disposed of by the examiner in his report, and are not of such nature as to require the issuance of a report by Division 2;

Wherefore, and good cause appearing therefor:

We find, That the evidence considered in the light of the exceptions and the replies thereto does not warrant a result different from that reached by the examiner; and that the statement of facts, and the conclusions, and the findings of the examiner, being

correct in all material respects, should be, and they are hereby, affirmed and adopted as our own; and

It is ordered, That the complaint in this proceeding be, and it is hereby, dismissed.

By the Commission, Division 2.

[SEAL] HAROLD D. MCCOY,
Secretary.

INTERSTATE COMMERCE COMMISSION

Served February 24, 1964

No. 34220

SASKATCHEWAN MINERALS
(SODIUM SULPHATE DIVISION)
v.
CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY, ET AL.

Decided ----------

Assailed rates on crude salt cake, in carloads, from Chaplin, Saskatchewan, Canada, to points in Oregon and Washington found not shown to be unjust and unreasonable, nor unduly prejudicial in relation to rates from origins in California and North Dakota to the same destinations. Complaint dismissed.

Fred H. Tolan for complainant.

Roger J. Crosby, Warren H. Ploeger, Randall B. Kester, John A. Reuling, Jr., Thormund A. Miller, Charles W. Burkett, W. Harney Wilson, and *Lawrence D. Silvernale* for defendants.

Willard P. Scott, Martin A. Meyer, Jr., and *Arthur A. Arsham* for interveners in support of defendants.

REPORT AND ORDER

RECOMMENDED BY TOBIAS NAFTALIN, HEARING EXAMINER

By complaint filed on February 17, 1963, the complainant, a crown corporation, incorporated under the laws of the Province of Saskatchewan, Canada, and wholly owned by that Province, alleges that the rates [1] on crude salt cake, in carloads, from Chaplin, Saskatchewan, to Albany, Fir, Portland, St. Helens, Springfield, and Toledo, Oreg., and Camas, Columbia Junction, Everett, Longview, Port Townsend, Seattle, and Tacoma, Wash., west of the Cascade Mountains and hereinafter collectively referred to as the Pacific Northwest destinations, and all directly intermediate points between Chaplin and these destinations, but specifically Wallula, Wash., are unjust and unreasonable, and unduly prejudicial to the complainant in relation to rates on the same commodity to the same destinations alleged to be unduly preferential from Trona and Westend, Calif., and points grouped therewith, and from Stanley, Spur 613, Douglas, Alkalbo, and Grenora, N. Dak. Complainant seeks the prescription of rates for the future which are just and reasonable under section 1, and which are not unduly prejudicial or preferential under section 3(1) of the Interstate Commerce Act.

The matter was duly referred to the examiner for hearing, and for the issuance of a report and recommended order. Hearing was held in Seattle, at which testimony was introduced by the complainant, certain

[1] Rates are stated in cents per 100 pounds; and references to tons are to tons of 2,000 pounds.

defendant United States rail carriers, and certain shipper interveners in support of the defendants.

Crude sodium sulphate, commonly called salt cake, is obtained by processing natural deposits, or as a by-product of chemical manufacture. It is used, so far as here relevant, chiefly by kraft paper mills as a chemical ingredient in the manufacture of pulp. It is granular and resembles common salt, has a density of 90 pounds a cubic foot, and a value of less than 1 cent a pound.

Complainant owns and operates the plant and facilities at Chaplin. They consist of an extensive land and water area including Chaplin Lake which is a bed of Glauber salt, an artificial lake, numerous dams, control gates, water storage areas, and pump stations. Three drying reservoirs contain 60 million gallons of brine, and three dry storage bins hold 13,000 tons of salt cake ready for shipment. Complainant has a 3-year stockpile of raw salt ready for processing into salt cake. The process takes only a few hours. Excluding the value of the Chaplin Lake deposits, the plant is valued at about $2 million. A feature of the operation is the extent to which natural forces, the seasons, weather, and gravity water-flow, perform functions that, in the case of complainant's competitors, must generally be accomplished through mechanical processes and industrial machinery. Its present actual annual production is about 100,000 tons, about two-thirds of which is sold in Canada, and the remainder in the United States. It could produce twice this amount if sales were made, and could supply the entire Pacific Northwest territory. The plant has operated commercially since 1948 under present ownership.

The three major producers of salt cake in California are Stauffer Chemical Company (Stauffer) at West-

end; American Potash & Chemical Corporation (A. P. & C.) at Trona; and U.S. Borax & Chemical Corporation (U.S. Borax) at Los Angeles Harbor. They supply the needs of the kraft pulp industry in the Pacific Northwest and are the interveners supporting the defendants. Westend and Trona are near each other on Searles Lake about 200 miles northeasterly from Los Angeles Harbor. The short tariff-route distances from Trona to the destinations are about 40 miles less than from Los Angeles Harbor. Stauffer started production in 1955, and presently ships about 50,000 tons a year to the destination territory. A.P. & C. is the largest United States producer of salt cake derived from either natural or by-product sources. It commenced selling salt cake to paper mills in Oregon and Washington in 1934, and its sales to these States in 1956 were 81,304 tons. Since then there has been a progressive annual decline in its shipments to these two States, attributed largely to Stauffer's competition, until in 1962 the total was 31,598 tons. U.S. Borax produces about 22,000 tons of salt cake a year at Los Angeles, and shipped 7 or 8 thousand tons in 1962 mostly to Tacoma.

With minor exceptions the traffic moves in hopper-type cars, and heretofore exclusively by railroad. Chaplin is about 57 miles east of Swift Current, Saskatchewan, north of Montana, and is on the main line of the Canadian Pacific Railway about 450 miles west of Winnipeg, Manitoba, and about 1,013 miles east of Vancouver, British Columbia. Complainant's traffic moves within Canada over the Canadian Pacific to the United States border gateways of Sumas, Wash., or Eastport, Idaho, where it is interchanged with United States lines.

The present base rates from Trona, Westend, and grouped origins, minimum 100,000 pounds, are 85

cents to Wallula, 77 cents to Everett and Port Townsend, and 74 cents to the other destinations. From Chaplin, minimum 80,000 or 100,000 pounds, the rate to Port Townsend is 88 cents, to Wallula 77 cents, and to all other destinations except Albany, Springfield, and Toledo, 85 cents. There are no joint through rates from Chaplin to the 3 points last named. The present combination rates to these points are based on the rate to Portland, and class 22½ rates beyond of 38.5, 46.5 and 50.5 cents, respectively, minimum 60,000 pounds. On August 31, 1961, the defendants established incentive rates, minimum 170,000 pounds.[2] Apparently, at present the shippers provide these high-capacity cars. These incentive rates are uniformly 8 cents lower than the base rates. Thus all rates on salt cake from Chaplin to these destinations are 11 cents higher than from the California origins, except that to Everett the rates are 8 cents higher, and to Wallula 8 cents lower.

The short tariff-route distances vary with the respective destinations. The shortest haul is from Chaplin to Wallula, in southeast Washington, 852 miles, compared with 1,286 miles from Trona. To the Oregon destinations the distances from Chaplin range from 1,061 to 1,219 miles, and from Trona from 943 to 1,098 miles; and to the Washington points, except to Wallula, from Chaplin they range from 1,050 to 1,146 miles, and from Trona from 1,095 to 1,298 miles. There is no specific showing as to the distances within Canada, but complainant concedes that such movements range from one-half to two-thirds of the total.

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[2] The incentive rates are subject to the following provision: "Applies only on shipments in covered hopper cars which carriers are not obligated to furnish, capacity not less than 2800 cubic feet, minimum weight 170,000 pounds."

The basis sought for the future is the same level as the incentive rates now in effect from the California origins except that to Everett the rate would be 3 cents lower, to Wallula 11 cents lower, and to Albany, Springfield, and Toledo, 11 cents higher. In every instance where equal or lower rates are sought, the tariff-route distance is less from Chaplin than from Trona to the same destination, and the reverse is true where a higher rate is sought, generally to points south of Portland. The average car-mile earnings to the destinations on loads of 170,000 pounds, under the present rates from Chaplin and Trona, respectively, are $1.33 and $1.01, and under the basis sought would be $1.06. The complainant contends that as the movements are substantially similar, the rates should be on the same level for comparable distances.

The defendants take the position that the circumstances surrounding the establishment of the international joint rates are not comparable to those which compel the maintenance of rates from the California origins depressed to meet potential water competition.

A question is presented as to the jurisdiction of the Commission to grant the relief sought. The rates from California and North Dakota in issue cover domestic transportation. The rates from Chaplin are voluntarily established joint one-factor international through rates. The complainant's position is that an order should run only against the United States lines, that the preferential domestic rates can be ordered increased without the order affecting the international rates; or alternatively, and preferably, if the international rates are found to be unlawful they can be ordered reduced, and the Canadian Pacific will concur. Essentially the complainant seeks an order against the carriers operating within the

United States prescribing lower joint international rates for the future under section 1, or an alternative order under section 3 requiring such carriers either to reduce the international rates to the level of the California rates or increase the domestic rates to the level of the Chaplin rates.

It is settled law that the Commission is without jurisdiction to prescribe just and reasonable joint through international rates for the future, and has no power to determine the lawfulness of the factors for the transportation from a Canadian origin to a border point; but carriers subject to the Interstate Commerce Act may be required to cease and desist from applying, or participating in, a joint through rate from a Canadian point which is in violation of the act.

There is no evidence to support the prescription of rates from the border points to the destinations, and no such prescription is requested. The only remedy available under section 1 of the act, therefore, would be an order to cancel the international joint rates, which would leave in effect presumably higher combination rates. Thus, the only real relief available to the complainant would be under section 3(1) of the act. The Commission has construed its powers under that section to prevent undue prejudice to Canadian shippers caused by a relation of rates for transportation wholly within the United States. *Consolidated Mining & S. Co. of Canada* v. *N.Y.C.R. Co.*, 299 I.C.C. 231. *Thermoid Co., Southern Division* v. *Baltimore & O. R. Co.*, 303 I.C.C. 743. Whether such relief is warranted is, of course, a matter to be decided upon the facts and circumstances of the case.

The complainant's principal contention under the allegation that the rates from Chaplin are unreason-

able is that transportation circumstances and conditions are similar to those on movements from California and North Dakota origins to the same destinations, and that these domestic rates are, therefore, a proper measure of the reasonableness of the international rates assailed. The movements within Canada range from one-half to two-thirds of the total distance from Chaplin to each of the destinations, and the lawfulness of rates on such movements are beyond the reach of the Commission. The Canadian Pacific although not represented at the hearing is willing to engage in the joint rates sought, but this does not constitute evidence that the present joint rates exceed a maximum reasonable level. Many considerations enter into a carrier's decision to reduce a rate, the obvious one here being to assist its shipper to compete in a new market.

Comparisons are made with the joint rates from Stanley to the considered destinations, which became effective on June 15, 1963. Those rates are the same as sought herein from Chaplin, except that to Wallula the rate is 3 cents higher.[3] In every instance the distance from Stanley is greater than from Chaplin. Stanley is a local point served by the defendant Great Northern Railway Company. The American Colloid Corporation intends to establish a processing plant near Stanley for the production of salt cake. At the time of the hearing, the plant was not completed and there had been no production. Testimony of the producers at other points casts some doubt on the prospects of this plant coming into production or being

[3] The Great Northern was granted fourth section relief (Order No. 19801, dated June 12, 1963) to permit establishment of a lower rate to Portland than to the intermediate point of Wallula upon a representation that rates to points west of the Cascade Mountains reflected the impact of coastwise water competition.

competitive under present market conditions. The Great Northern has established these rates to Washington and Oregon as the best potential United States market, pursuant to its policy to assist in the location of industry along its line, and to assist the potential shipper to reach that market. The distance factor in building these rates was secondary to the necessity to provide a market for the product.

Certain rate comparisons are made by the complainant with respect to salt cake moved under transcontinental rates from Trona to points in the Midwest, Southwest, and South. These rates to important destinations range from 74 to 90 cents for distances ranging from 1,692 miles to 2,597 miles, and yield car-mile earnings based on minima of 100,000 to 170,000 pounds varying from 38.8 cents to 70.8 cents. Rates on the same commodity from the Southwest to the Midwest for distances ranging from 851 to 1,225 miles average 67.6 cents, minimum 100,000 pounds, and are approximately on the level of the rates sought, minimum 170,000 pounds, for comparable distances. Granted that there are probably some movements under these rates, they were simply taken from the tariffs for comparative purposes, and there is no evidence as to when or why they were established or the amount of traffic moved thereunder. The Commission has repeatedly stated that such comparisons have but slight probative value in determining the reasonableness of the rates assailed. At best, upon this record, they tend to show that the rates assailed are within the zone of reasonableness. Similar rate comparisons extracted from tariffs were made by the same witness on other heavy-loading commodities from points in western Canada to Portland, but with the exception of one rate on fertilizer from Medicine Hat, Alberta, he had no knowledge of any movement.

The complainant offered in evidence exhibit 22 to which an objection by the defendants to its admission in evidence was sustained. The offer is renewed on brief. This exhibit consists of a table extracted from a publication of the cost finding section of the Commission, "issued as information" but not adopted by the Commission, which purports to show mileage cost scales for hopper-covered cars based on rail operations for 1961 in the western district of the United States. The scales are built on the averages of all commodities moved, and do not include movements by Canadian defendants. Apart from the fact that the witness offering the exhibit was unable to stand cross-examination on its contents, the averages include movements of all kinds, of high and low value, for varying distances. Scales so developed have no relevancy in determining the level of rates on specific commodities. The exhibit is rejected. The complainant also shows the total loaded freight car-miles in 1961 for each of the principal United States defendants, the corresponding freight transportation revenue, and by dividing one into the other develops "revenue per car-mile in 1961." This data is subject to substantially the same infirmities with respect to the traffic consist and types of movement as exhibit 22 mentioned above, and has little, if any, probative value.

In 1933 A.P. & C. informed the rail carriers that it was planning production of salt cake at the Trona plant, that a rate of 30 cents was needed to assure all-rail movement to the Pacific Northwest, and that if it were not established the entire movement would be by water. Initially all of the rail lines concerned in the movement did not approve a rate that low, but after becoming convinced that otherwise the movement would be lost to the water lines, it was estab-

lished subject to a minimum of 100,000 pounds, effective May 5, 1934. The rate applied on packages or in bulk from Trona to Albany, Portland, St. Helens, Springfield, Longview, and Camas. Shortly thereafter, A.P. & C. requested that the 30-cent rate be extended to Seattle and Tacoma, again stating that a water service from Los Angeles Harbor was available. On August 22, 1934, the 30-cent rate was accordingly established from Trona to these points. That same year U.S. Borax prevailed upon the carriers to establish the same rate to cover its shipments from its Los Angeles plant to the Pacific Northwest. Again, effective May 23, 1935, the rate was extended from Dolanco, Calif., a point on the Pacific Electric Railway Company between Los Angeles and Los Angeles Harbor to St. Helens to meet the competition of unregulated trucks and tramp schooner liners operating along the coast and up the Columbia River.

In 1936, a receiver of salt cake at Port Townsend requested the 30-cent rate. The carriers, instead, established thereto on November 25, 1936, a 35-cent rate from Trona and grouped points. On March 28, 1938, this rate became 39 cents under a general 10 percent increase. This consignee, which was receiving about 6,000 tons annually, thereupon sought elimination of the increase, and represented that its total transportation cost by water would be 35 cents. The carriers accordingly reduced the rate to 35.5 cents effective August 31, 1939, the other rates remaining at 33 cents. Effective January 1, 1947, under another general increase, the rates were increased by 6 cents to 39 cents.

On September 15, 1947, the 39-cent rates were increased to 41 cents as a result of the findings in *All Rail Commodity Rates Between Calif., Oreg., and Wash.*, 268 I.C.C. 515.

On August 21, 1948, there was a general increase of 6 cents in the rates on salt cake to all the considered destinations under permission granted in Ex Parte No. 166, *Increased Freight Rates, 1947,* 270 I.C.C. 403. In that proceeding general increases ranging from 20 to 30 percent were approved, but the rail carriers requested smaller increases, referred to as hold-downs, on certain commodities, which in the case of salt cake was 6 cents. Coastwise water lines opposed the hold-downs on the ground that the rates were unreasonably low and prevented the resumption of postwar coastal operation. (pp. 447–448)

On further hearing in *All Rail Commodity Rates Between Calif., Oreg., and Wash., supra,* 277 I.C.C. 511, decided April 10, 1950, the Commission found the rail rates established consistent with the prior findings not to be below a reasonable level nor otherwise unlawful. The report (pp. 563–564) contains the following findings:

> Since the beginning of the late World War, regular water service by common carriers between the Pacific coast ports has virtually ceased. One coastwise common carrier is now in operation, and it affords only a limited service. Several lines which operated in this service prior to World War II and which hold certificates of convenience and necessity announce that they are ready and willing to resume coastwise operations, if assured that they can secure an adequate volume of traffic at rates high enough to cover their expenses and yield them some profit. However, up to the present time they have been unsuccessful, either because of their inability to attract the traffic in the case of competition, chiefly with the coastal rail lines, or with motor carriers, or because traffic they secured did not yield sufficient revenues to support their operations.

> The water lines, the Maritime Commission, and other supporters of the water lines have contended from the inception of this proceeding that the rail rates between the Pacific coast ports were unreasonably low, and have urged even greater increases in the coastal rail rates than we permitted generally in the successive Nation-wide rate increase cases.

These rates were subject to general increases from time to time which brought them up to the level of the base rates, mentioned above, on October 24, 1960.

Since April 1960 Stauffer has been shipping salt cake by water to Nanaimo on Vancouver Island, British Columbia. Rail hopper cars are used for the movement to Long Beach Harbor, Calif., thence barge or vessel to Stauffer's storage depot at Nanaimo, with delivery therefrom by truck or rail to points on the Island. Stauffer shows the potential water competition for the considered traffic based on its experience in this operation; and A.P. & C. makes a similar showing based on available or possible alternatives but without actual experience of water movements to these destinations.

The possible costs per ton may be summarized as follows: The present rail charge from Trona to Long Beach is $4.90. There is also in effect from and to these points by rail a charge of $3.70 on export shipments to destinations other than Canada and the west coast of Mexico, and a motor carrier charge of $3.70 on soda ash, a similar commodity, to Los Angeles. These shippers are confident that under a firm commitment for water carriage, the salt cake will be transported to the port for $3.70. Stauffer, however, has not been able to get this rate on its present operation. Stauffer pays $3.44 from Long Beach to Nanaimo and uses this figure. A.P. & C. received a tentative quotation in preparation for this hearing of $3.75 for barge

operation by Pacific Inland Navigation Company, Inc., to Vancouver. Stevedoring and wharfage at Long Beach now cost Stauffer $1.34, and A.P. & C. $1.35 on similar commodities. Marine steamship insurance is estimated by Stauffer at 8.5 cents, compared with its present cost of 4 cents, and A.P. & C. estimates marine barge insurance at 33 cents. Stauffer's unloading charge at Nanaimo is $1.31, and A.P. & C. received a quotation for unloading at Vancouver of $1.35. Stauffer's proprietary terminal handling cost at Nanaimo is $3. A.P. & C. apparently makes no allowance for destination terminal handling, and points out that many receivers are at tidewater and could receive direct service by barge for 50 cents unloading charge as compared with the estimate of $1.35. To points which cannot receive direct tidewater delivery, an additional truck delivery cost would accrue which Stauffer shows at Nanaimo ranges from 93 cents to $1.86. Thus the costs of water transportation related to possible similar costs to tidewater points and nearby points would be within a range of $13.81 to $16.54, assuming terminal warehousing at destination; and possibly about $4 less for direct delivery by vessel.

These costs would provide a total service similar to that under the all-rail charge of $13.20, minimum 170,000 pounds. The water movement would be as a bulk commodity exempt from rate regulation under part III of the act. The total annual movement all-rail to these destinations is about 89,000 tons. Although Stauffer has been using water carriage to Nanaimo since 1958, it has not used a similar service to the considered tidewater destinations. To institute a water service would require several coastal barges with relatively small capacity of 2,000 tons, which would cost about $250,000 each. Other terminal facilities would be needed. Stauffer and A.P. & C.

regard the Pacific Northwest market as so important that to stay in it they will unquestionably resort to water transportation if it becomes necessary and feasible to do so because of changes in the rail situation.

U.S. Borax has its own dock and berth facilities at Los Angeles Harbor, and has recently completed building a bulk storage and loading facility for the movement of borax in bulk for export. With a minor investment in conveying equipment it could be adapted for the storage and loading of salt cake. Several times in the past this producer has studied the feasibility of shipping salt cake by water. The latest complete study was made about 1960, using Longview as the destination, and this study showed an approximate cost of $8.00 per ton for movements from its plant to points in Vancouver before the unloading charge at destination. At that time the leasing of barges to use for storage and the towing of these barges from the plant site to the Pacific Northwest was contemplated. A further study of the possibility of movement by water is now under consideration in light of the completion of the loading facility. The 1960 study was made about the same time that the rail incentive rates were established, and although this shipper had not approached the railroads to request the rate reduction, it had informed them that the study was being made. The study was discontinued because of the establishment of the incentive rates.

As an example of the ever-present water competition, the defendants refer to southbound rates on paper products which were reduced on July 18, 1962, in order to avoid the threatened loss of this traffic to barge transportation. Because of this water competition the railroads sought, and received, authority from the Commission to depart from the long-

and-short-haul provisions of section 4 of the act at intermediate destinations. Also, as mentioned above, in connection with the establishment of the rates on salt cake from the North Dakota points to the destinations herein west of the Cascade Mountains similar fourth-section relief was granted so as to permit the establishment of a lower rate to Portland than to Wallula.

Certain large receivers of salt cake testified for the complainant in support of a reduction in the rates from Chaplin. The receiver at Tacoma is located on water but presently has no facilities for handling boatload or bargeload quantities of salt cake. One receiver at Everett has a plant on the Snohomish River about 4.5 miles up-stream from Port Gardner, and another has plants at Everett and Columbia Junction, both of which are on water. All of these receivers acknowledge, however, that they would consider transportation by water if the charges were competitive.

It is apparent that no water service can compete with the present rail rates. If rail charges were generally increased by $2.20 a ton to the Chaplin level under an alternative finding under section 3(1) of the act, there would be an opportunity for competing water carriage. Defendants are so cognizant of this situation that they state their only alternative under an order of the Commission to provide parity with Chaplin would be to reduce rates from that point. The evidence is conclusive that the transportation of salt cake by water from the California origins to almost all destinations involved in this proceeding would be a possibility if the present all-rail rates were increased to the Chaplin level, and that such water services are, or could be made, available. In that event, the shippers would give serious

consideration to moving the traffic by water, with the possibility that the movement would be lost to the defendants.

The rates from the North Dakota points are completely dependent on the rates from California to the same destinations. The rates established by the defendants from Trona, and later Westend, reflect the fact that these producing points have access to the ports of Long Beach and Los Angeles Harbor and a water route to the Pacific Northwest market. The presence of this water route as a potential source of competition by water carriers governed the level of the rate established in 1934, and continues to require the maintenance of the rail rates below a maximum reasonable level from these and related origins. These rates have proved effective in retaining the traffic exclusively for the rails, but this does not mean that potential water competition has not had a depressing effect on them. Thus, the rates from the California origins are not a measure of the maximum reasonable level of the rates from Chaplin.

The complainant has failed to prove that the assailed rates from Chaplin are unjust or unreasonable.

The main thrust of the complaint is that the rates from Chaplin are unduly prejudicial in relation to the alleged unjustly preferential domestic rates. Under substantial parity of rates the complainant would have an equal opportunity to compete in the Pacific Northwest market. It originally attempted to sell in that market at its normal price of $16.50 a ton at origin plus the freight rate, but was unsuccessful. Recently it has made some sales by absorbing the difference in the freight charges in an attempt to invade the market. This can only continue if there is a net profit in the sale sufficiently above the freight rate absorption. The disadvantage of 11 cents per 100

pounds, for example, is reduced at present to about 8.6 cents because of the current discount on Canadian funds, and complainant suffers this loss by absorption in its selling price in order to be competitive.

Preference or prejudice are forbidden under section 3(1) of the act only if they are undue or unreasonable. It is well settled, however, that undue prejudice does not arise out of a mere difference or disparity in rates. To constitute undue prejudice, it is requisite that circumstances and conditions surrounding both the prejudiced and preferred points shall be substantially similar. The existence of water competition at one point, and its absence at the other, creates substantial dissimilarity of circumstances. *Royal Crystal Salt Co.* v. *American Transp. Co.*, 227 I.C.C. 9, 15.

The defendants have proved that the influence and compulsion exerted by the coastwise waterway has depressed the level of the all-rail rates from the California origins to the Pacific Northwest destinations. A substantially dissimilar situation prevails from Chaplin, an inland point. In addition, as shown above, the complainant has in other respects failed to show that there is substantial similarity in transportation circumstances and conditions in the movement from Chaplin with those from the California origins. It has not been proved, therefore, that the circumstances and conditions surrounding the advantage accorded the California shippers are substantially similar to those from Chaplin.

The alleged unduly preferential rates from Stanley are maintained, among others, by the Great Northern, which can provide single-line service to the principal destinations. The Canadian Pacific precludes the Great Northern from participation in joint rates from Chaplin to the subject destinations. Thus, an effec-

tive order cannot be entered against the Great Northern requiring it under section 3 of the act to establish parity in the levels of the rates from these origins, as such an order must give it an option to correct the situation by changing either or both levels. In addition, with respect to all participating carriers, the rates from Stanley are directly related to those from the California origins, and without a change in the latter, a change in the Stanley rates would afford the complainant no remedy. In any event, absent actual production at Stanley, the claim of undue preference is premature. The allegations of undue prejudice and preference are not sustained.

The Examiner finds, on consideration of the whole record, that the rates assailed have not been shown to be unjust, unreasonable, or unduly prejudicial or unduly preferential.

It is ordered, That the complaint herein be, and it is hereby dismissed; and that in the absence of a stay or postponement or the timely filing of exceptions, the effective date of this order shall be 30 days from the date of service thereof.

Dated at Washington, D.C., this 29th day of January, 1964.

By the Commission, Tobias Naftalin, Hearing Examiner.

[SEAL] HAROLD D. MCCOY, *Secretary.*

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IN THE

Supreme Court of the United States

October Term, 1966

No. 526

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION;

and

GREAT NORTHERN RAILWAY COMPANY; UNION PACIFIC RAILROAD COMPANY; SPOKANE INTERNATIONAL RAILROAD COMPANY; CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY; NORTHERN PACIFIC RAILWAY COMPANY; SOUTHERN PACIFIC COMPANY; AMERICAN POTASH & CHEMICAL CORPORATION; and STAUFFER CHEMICAL COMPANY,

Appellants,

v.

SASKATCHEWAN MINERALS (SODIUM SULPHATE DIVISION), a Crown Corporation,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

JURISDICTIONAL STATEMENT OF RAILROAD AND SHIPPER APPELLANTS

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

JURISDICTIONAL STATEMENT OF RAILROAD AND SHIPPER APPELLANTS

Opinions Below

The opinions of the District Court are reported at 253 F. Supp. 504. The decision of the Interstate Commerce Commission is reported at 325 I.C.C. 621. The District Court's opinions and judgments are set forth in Appendices A, B, C and D of the Jurisdictional Statement of the United States and Interstate Commerce Commission, to which the Court is respectfully referred.

Jurisdiction

This action was brought under 28 U.S.C. 1336. 1398, 2284 and 2321-2325, to set aside an order of the Interstate Commerce Commission. The judgment of the District Court was entered January 27, 1966. A motion for amendment of judgment was filed on February 4, 1966. A supplemental Memorandum Decision was filed March 3, 1966, and amended judgment of the Court was entered April 6, 1966. Intervening defendants filed notice of appeal in the District Court on June 2, 1966, and defendants United States and Interstate Commerce Commission filed notice of appeal on June 6, 1966. By order of the District Court dated August 5, 1966, the time of appellants to file their Jurisdictional Statement was enlarged to and including September 6, 1966.

The jurisdiction of the Supreme Court to review the judgment of the District Court on direct appeal is conferred by 28 U.S.C. 1253 and 2101(b). *United States* v. *Drum*, 368 U.S. 370 (1962).

Question Presented

The appeal presents this question: Where the District Court has set aside, as not adequately supported by the evidence, an order of the Interstate Commerce Commission finding that railroad rates were not shown to be unduly prejudicial to the shipper-plaintiff, has the District Court erred and exceeded the proper function of a reviewing court by peremptorily instructing the Commission to grant relief to the plaintiff and by

prohibiting the Commission, on remand, from receiving additional evidence on the right of the plaintiff to be granted relief?

Statute Involved

Section 3(1) of the Interstate Commerce Act, 49 U.S.C. 3(1), provides:

> It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

Statement

A. Proceedings Below

Appellee is a producer at Chaplin, Saskatchewan, of crude sodium sulphate (salt cake) used in the manufacture of kraft pulp. It complained to the Inter-

state Commerce Commission that the railroad rates on salt cake from Chaplin to points in Oregon and Washington were unduly prejudicial in that such rates were higher than the rates from California producing points for comparable distances to the same destinations. The California origins are located on, or are directly accessible to, a coastwise waterway that extends to the destinations in the Pacific Northwest. Chaplin, an inland point in Canada, has no access to a water route. The railroads and California producers, in defense of the rates, introduced evidence to show that the rail rates from California are set at levels designed to meet water competition. The Commission found that this made a substantial dissimilarity of circumstances which justified the differences in rates. In arriving at its decision that a sufficient degree of water competition exists, the Commission considered the cumulative effect of all the individual factors which were introduced to demonstrate that present rail rates are water compelled.

Upon review the District Court concluded that the evidence of record did not demonstrate such water competition as would justify a disparity in rates. The lower court held, as a matter of law, that a firm commitment by a water carrier was needed effectively to establish the existence of water competition.[1]

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[1] Appellant railroads and shippers are prepared to offer evidence not only of a firm commitment by a water carrier, but of actual water transportation of the commodity in question between the Pacific Coast points involved. Appellants herein will ask the Commission to receive this evidence if the Commission's discretionary right to receive further evidence is established by this appeal.

B. The Extraordinary Remand

In its opinion of December 8, 1965, the court stated:

> "'The order appealed from is set aside and the matter remanded to the Interstate Commerce Commission for further proceedings in accordance herewith."

On December 21, 1965, counsel for plaintiffs issued a notice of Proposed Order to be submitted January 21, 1966. The Proposed Order contained the following clause:

> "That the subject matter of this proceeding be and it hereby is remanded to the Interstate Commerce Commission with the direction hereby that said Commission proceed to grant to the plaintiff relief, in alternative form, pursuant to Section 3(1) . . ."

Objections to the proposed order of plaintiff were filed by the Commission on January 13, 1966; by intervening railroad defendants on January 17, 1966; by intervening defendant Stauffer Chemical Company on January 18, 1966; and by intervening defendant American Potash & Chemical Corporation on January 19, 1966. The objections uniformly pointed out that proper procedure, where a court determines that an order of an administrative agency is not supported by substantial evidence, is for the court to remand the case to the agency for further proceedings consistent with the opinion of the court. Proposed Orders in conformity with this position were submitted to the court by the Commission and intervening defendants.

On January 27, 1966, the court issued its judgment, setting aside the orders of the Commission and ordering that they:

> ". . . be, and they are hereby, . . . remanded to the Commission for further proceedings with instructions to grant relief to the plaintiff in accordance with the opinion heretofore entered by this court."

A Motion for Amendment of Judgment, dated February 4, 1966, was filed by the Commission, seeking clarification as to:

> ". . . whether the Interstate Commerce Commission is free, under said judgment, to re-open the proceeding for additional evidence or to take any other action which is consistent with the opinion of this Court dated December 8, 1965."

On March 3, 1966, the court issued a Supplemental Memorandum Decision stating:

> "It is the intention of this court that the Interstate Commerce Commission be free under said judgment to open the proceedings for the receipt of additional evidence limited, however, to the nature of the relief to be granted to the plaintiff. It is not intended that the Commission receive additional evidence on the right of the plaintiff to be granted such relief."

An Amended Judgment was presented by plaintiffs on March 8, 1966. This judgment was adopted by the Court and entered on April 6, 1966. It ordered that:

> ". . . the proceedings be remanded to the Commission for further proceedings with instructions

to grant relief to the plaintiff in accordance with the opinion heretofore entered by this court on December 8, 1965, and the Supplemental Memorandum Decision entered by this Court on March 3, 1966."

The Question is Substantial

The question presented on this appeal involves an important and fundamental theory of administrative law. The specific issue concerns the carefully guarded balance of administrative and judicial power upon judicial review of agency action. In the case below, a three-judge court, convened pursuant to 28 U.S.C.A. 2325, concluded as a matter of law that there was not sufficient evidence of record to support the decision of the Interstate Commerce Commission. However, instead of remanding for further proceedings to determine, in light of the court's opinion, *whether* relief should be granted, the case was remanded with specific instructions to grant affirmative relief. The judgment wholly withdraws the agency prerogative of making a reconsidered decision based on additional evidence.

The effect of the judgment for which review is sought is to deny the Interstate Commerce Commission the opportunity to render a decision which Congress has entrusted to agency expertise.[2] This Court

[2] The essence of the question presented to the Commission was whether an "undue or unreasonable" preference or prejudice exists on the facts of this case. 49 U.S.C. 3(1). Since resolution of this issue requires the analysis and weighing of a variety of transportation circumstances and conditions, and since evaluation of these types of factors is within the special competence of the Commission, the facts of this case would appear to present the strongest possible requirement for final agency decision.

has determined that where a three-judge court sets aside a decision of the Interstate Commerce Commission based on lack of substantial evidence, the Commission may reconsider its decision in light of the legal principles set down by the three-judge court. It is not the province of a three-judge court to render a final judgment, the effect of which is to preclude the Commission from making an administrative decision based on the corrected legal doctrine. *Arrow Transportation Co.* v. *Cincinnati, N.O. & T.P. Ry.*, 379 U.S. 642 (1965). *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940).

The traditionally recognized rule is that judicial review of agency action is limited to questions of law. It is error for a court to render a decision which has the effect of making a final agency determination. As this Court stated in the case of *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17, 20:

> ". . . the function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the Commission for reconsideration."

This Court has recognized that effective "reconsideration" requires that the agency be free to reopen proceedings to take any additional evidence required to render a sound administrative decision, based on the legal guidelines provided by the reviewing court.

> "On review the court may thus correct errors of law and on remand the Commission is bound to act upon the correction. . . . But an administrative determination in which is imbedded a legal question open to judicial review does not impliedly

> foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge." *Federal Comm'n* v. *Broadcasting Co., supra,* at p. 145.

It would be impossible indeed to expect the Interstate Commerce Commission to enforce the "legislative policy committed to its charge" if, on remand, it is foreclosed from taking further evidence. Accordingly this Court has adhered to the policy of permitting a federal agency, on remand, to take additional evidence prior to making its final decision. As stated in *Konigsberg* v. *State Bar of California,* 366 U.S. 36, at pages 43-44:

> ". . . recalling Konigsberg for further testimony, the Committee did only what this Court has consistently held that federal administrative tribunals may do on remand after a reviewing court has set aside agency orders as unsupported by requisite findings of fact. *Federal Communications Commission* v. *Pottsville Broadcasting Co.,* 309 U.S. 134; *Fly* v. *Heitmeyer,* 309 U.S. 146."

Because the judgment of the three-judge court in this proceeding contravenes established judicial policy[3] and precedent, summary reversal of the lower court's judgment is appropriate. *Arrow Transportation Co.* v. *Cincinnati, N.O. & T.P. Ry., supra.*

---

[3] Recognizing the Commission's discretionary power to order further proceedings is also in harmony with legislative policy, as expressed in 49 U.S.C. 17(6), which gives the Commission power at any time to grant rehearing, reargument, or reconsideration if sufficient reason therefor be made to appear.

Conclusion

It is submitted that the question presented by this appeal is substantial, in that it directly defines the function and power of the Interstate Commerce Commission and, by analogy, all federal agencies. For the reasons advanced above, protection of the objectives entrusted by Congress to final administrative decision requires correction of the unprecedented assumption of power by the court below. Accordingly the District Court should be directed to remand the case to the Interstate Commerce Commission for further proceedings consistent with its opinion of December 8, 1966.

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Certificate of Service

I, ARTHUR A. ARSHAM, attorney for Stauffer Chemical Company, one of the appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 1st day of September, 1966, I served copies of the foregoing Jurisdictional Statement to the Supreme Court of the United States on the several parties thereto, as follows:

1. On the Interstate Commerce Commission, by mailing a copy, in a duly addressed envelope, with air-mail postage prepaid, to Robert W. Giannane, its General Counsel, at the offices of the Commission, Washington, D. C. 20423.

2. On Mrs. Betty Jo Christian, Attorney for the Interstate Commerce Commission, who represented the Commission in the appeal for which review is sought herein, by mailing a copy, in a duly addressed envelope, postage prepaid, to the offices of the Commission, Washington, D. C. 20423.

3. On the Solicitor General, by mailing a copy, in a duly addressed envelope, with air-mail postage prepaid, to the Department of Justice, Washington, D. C. 20530.

4. On Saskatchewan Minerals, a Crown corporation, plaintiff in the action and appellee herein, by mailing copies in a duly addressed envelope, with air-mail postage prepaid, to its attorneys of record, Robert

Baronsky, Esq., Beresford & Booth, 700 Olympic National Life Building, Seattle, Washington 98104.

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IN THE

Supreme Court of the United States

October Term, 1966

No. 526

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION;
and
GREAT NORTHERN RAILWAY COMPANY; UNION PACIFIC RAILROAD COMPANY; SPOKANE INTERNATIONAL RAILROAD COMPANY; CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY; NORTHERN PACIFIC RAILWAY COMPANY; SOUTHERN PACIFIC COMPANY; AMERICAN POTASH & CHEMICAL CORPORATION; and STAUFFER CHEMICAL COMPANY,
Appellants,
v.
SASKATCHEWAN MINERALS (SODIUM SULPHATE DIVISION), a Crown Corporation,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

APPELLEE'S MOTION TO AFFIRM AND BRIEF IN SUPPORT OF MOTION

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

APPELLEE'S MOTION TO AFFIRM AND BRIEF IN SUPPORT OF MOTION

MOTION TO AFFIRM

I. Statement of Object

The appellee respectfully moves that this Court affirm the Amended Judgment of the District Court entered on April 6, 1966, for the reason that the following question presented by the appellants is so unsubstantial as not to require further argument: Did the District Court have the discretionary power to limit the scope of its remand to the Interstate Commerce Commission, considering the

general nature of the administrative proceeding involved and the nature of the issue determined on review?

II. Statement of Facts Upon Which the Motion to Affirm Is Based

The appellee, a crown corporation of the Province of Saskatchewan, Canada, commenced an adversary-type proceeding by complaint to the Interstate Commerce Commission naming certain railroads as defendants and alleging, in part, a violation of Title 29, U.S.C.A. 3 (1) of the Interstate Commerce Act. Specifically, the appellee complained that higher all-rail rates for shipment of its product to particular Pacific Northwest destination points were unduly prejudicial to it in view of lower all-rail rates for shipments of the substantially identical product of competing California-based shippers from greater rail distances to the same destination points. The appellee requested relief by a reduction in the Saskatchewan rate, an increase in the California rate or an adjustment in both rates, any of which would result in a parity of rates. The major competing shippers intervened in the Commission proceeding and are appellants in this Court.

In the Commission proceeding, the defendant railroads and the intervening shippers defended the lower rates for the California-Pacific Northwest movements on the basis of asserted Pacific Coast water route competition to the destination points involved. The Commission concluded, after full hearing, that the evidence established water competition for the California-Pacific Northwest rail movement to such an extent as to justify the lower rates.

Appellee requested a review by a three-judge District

Court which concluded, following presentation of briefs and oral argument, that the record did not contain substantial evidence to support the Commission's finding of water competition justifying the disparity in the rail rates. There having been no errors by the Commission as to (1) the correct legal propositions or statutory standards to be applied, (2) exclusion of relevant evidence, or (3) admission of irrelevant evidence, the District Court ultimately remanded the matter to the Commission and specifically instructed it to grant relief to the appellee but left the Commission free to exercise its administrative discretion in framing the nature of the relief to be granted.

BRIEF IN SUPPORT OF MOTION

I. The Question Presented by the Appellants Is Not Substantial

The limited nature of the remand by the District Court was a proper exercise of its judicial power following review of the administrative proceeding. The appellants propose that the District Court had no alternative, under the circumstances, but to remand the case to the Commission "for further proceedings not inconsistent with the Court's opinion" and that it could not, in any manner, limit the scope of such "further proceedings." This Court never has given validity to such a sweeping proposition. It is fundamental that a court reviewing an administrative decision sits essentially as a court of equity. In *Ford Motor Company v. National Labor Relations Board*, 305 U.S. 364 (1939), the Court recognized that equity powers are available in reviewing agency action and, without stepping into the administrative province, a court may

adjust relief to the exigencies of a particular case in accordance with equitable principles. That it is grossly incorrect to suggest a court may never limit the nature or scope of the agency proceeding upon remand is seen from the following instances where limited remands were applied or recognized as valid:

Ford Motor Company v. National Labor Relations Board, supra.

Morand Brothers Beverage Co. v. National Labor Relations Board, 204 F.2d 529 (7th Cir. 1953).

United Airlines v. Civil Aeronautics Board, 281 F.2d 53 (D.C. Cir. 1960).

Tascarora Indian Nation v. Federal Power Commission, 265 F.2d 338 (D.C. Cir. 1959).

II. The Extent of a Reviewing Court's Discretion as to the Form of the Remand Depends Upon the Nature of the Agency Proceeding Reviewed and the Precise Nature of the Issues Decided

A. The Nature of the Agency Proceeding.

Agency-initiated proceedings conducted for legislative or rule-making purposes and *ex parte* proceedings, concerning requests for particular regulatory grants, involve the application of broad public policies. It appears clear from the case authorities that, following review of such proceedings, a court seldom, if ever, should place limitations on a remand, since the agency must be left to its "continuing initiative to realize the public purposes." To be contrasted are the agency proceedings for adjudicative purposes which are cast in an adversary mold similar to any court litigation brought by one private interest against

another. Where the proceeding is so postured, depending upon the nature of the issues decided by a reviewing court, it may be proper to apply traditional "law of the case" doctrine in formulating the remand to the agency. Suffice to say that the varying kinds of agency proceedings, covering a spectrum from pure legislative proceedings to pure adjudicative proceedings, require that each situation be treated separately by a reviewing court in applying the technique of remand.

B. The Nature of the Issues Presented on Review

Whether a remand may be limited or not also necessarily depends upon the kind of correction made by the reviewing court. When an agency makes findings after having prejudicially excluded relevant evidence or included irrelevant evidence, then, upon holding that the agency so erred, a court should remand in a fashion to allow the agency to reconsider the factual issues again in light of the properly constituted record. A remand under such circumstances occurred in *National Labor Relations Board v. Donnelly*, 330 U.S. 219 (1947). Also, when an agency renders its conclusions on the basis of an erroneous rationale or improper understanding of the applicable legal principles, which often is reflected for a court to correct the error and remand to permit reconsideration of the evidence in light of the correct legal principles. Instances of remands under such circumstances are *Konigsberg v. California State Bar*, 366 U.S. 36 (1961); *Arrow Transportation Company v. Cincinnati, N.O. & P. Ry.*, 379 U.S. 642 (1965); and *Securities Exchange Commission v. Chenery*, 322 U.S. 194 (1947).

In each of the aforementioned review situations, the

issue determined does not foreclose an agency from once again performing the function entrusted to it, i.e., determining a set of facts and reaching conclusions according to the appropriate standards. To be distinguished is the situation where the sole error by the agency is its failure to accept as a fact that which is required by the evidence.

C. The Instant Case.

The proceeding before the Interstate Commerce Commission commenced by the appellee essentially was of an adversary nature. The Commission sat in a judicial capacity to decide, on the record made by the parties only, whether the rail rates were unduly preferential and prejudicial as between the complainant and its competing shippers. As a matter of evidentiary procedure, the appellee presented a *prima facie* case for relief from a section 3(1) violation, by showing that it was subject to a higher rate for a shorter haul, and the burden was upon the appellant railroads and intervening shippers to prove, as a matter of defense, that there existed water carrier competition justifying the lower California-Pacific Northwest rail rates. *Atchison, Topeka and Santa Fe Ry. Co. v. U.S.*, 218 F. Supp. 359 (D.C. Ill. 1963) and *Mississippi Cotton Seed Crushers Association v. A. B. and C. Ry. Co.*, 238 I.C.C. 87, aff'd. 251 I.C.C. 643 (1942). On this basic issue, an extensive agency hearing was held and a large record compiled. The only serious question on the review to the District Court was whether the Commission properly sustained the railroads and intervening shippers in their defense of a water-compelled rate.

The District Court appropriately characterized the ap-

pellants' attempt to prove their asserted defense when it stated: "The intercoastal movement by which the rate disparity is sought to be justified is based upon a phantom fleet operating to non-existent terminals at illusory costs."

The effect of the review by the District Court was that it resolved that the appellants had not established their affirmative defense by failing to justify the lower California rate; thus, the appellee had presented a case entitling it to relief. There were no conclusions by the District Court that the Commission erroneously admitted or excluded evidence, made conclusions unsupported by adequate findings or that it applied any incorrect legal principle to the facts. In short, the only conclusion was that the record, to which all parties had full opportunity to contribute, did not support the findings necessary to appellants' asserted defense. Instead, the record overwhelmingly displayed the absence of a water-compelled lower California rail rate. With this in mind, the District Court formulated its remand so that the appellee could obtain from the Commission relief to which it was entitled initially.

III. The Cases Relied Upon by Appellants Are Inapposite

Appellants place reliance upon four cases which are to be distinguished from the case at hand.

Federal Power Commission v. Idaho Power Commission, 344 U.S. 17 (1952) involved an application to the agency for a license to maintain a hydro-electric project. The agency granted the license on certain specified conditions. On appeal, the Court of Appeals properly held

that the agency was without authority to attach the specified conditions. It then ordered that the cause be remanded to the agency "for the entry of an order in accordance with the opinion of this court." Upon a request by the agency for a clarification of the Court's order, a new judgment was entered by the Court of Appeals specifically affirming the agency's original order but modifying it by striking the specified conditions. The Supreme Court held that the Court of Appeal's second judgment was improper in that it usurped the administrative function. The Court stated that the first order of remand was proper in that the agency could have either granted the license or it could have decided that, in the public interest, the license should not be granted in view of the factors which were the basis for the originally specified conditions. Here, after the review, there was clearly something more for the agency to do in the way of deciding the merits of the original application. Furthermore, it is very significant that the proceeding was not in the nature of an adversary proceeding, but rather was an *ex parte* application to the agency, whose duty it was to decide the matter on the basis of broad public policy. The case is not authority for restricting a court's remand powers in all agency-review situations.

In *Federal Communications Commission v. Pottsville Broadcasting Company*, 309 U.S. 134 (1940), there was involved, as in the *Idaho Power Company* case, an *ex parte* application for a license to do business, i.e., to operate a broadcasting station. The Commission denied the application. On appeal, the Court of Appeals reversed, holding that one of the Commission's conclusions was based upon a misunderstanding of law, and the Court,

remanded to the ". . . . Commission for reconsideration in accordance with the views expressed." On remand, the Commission sought to reconsider Pottsville's application along with others and on a comparative basis. Pottsville then obtained a Writ of Mandamus from the Court of Appeals requiring the Commission to reconsider the application of Pottsville on the basis of the record as originally made before the agency. The Commission appealed, and the Supreme Court dissolved the Writ of Mandamus, holding that the Court of Appeals' interpretation of the scope of its own mandate was not necessarily conclusive. The Supreme Court then discussed, at length, the nature of review of the administrative action and concluded that in view of the nature of the agency proceeding involved, once the court corrected the error, the agency again could reconsider on a new record. Here, it is submitted the Court's decision is properly to be understood by the non-adversary nature of the agency proceeding in which the Commission was bound to "enforce the legislative policy committed to its charge."

Securities Exchange Commission v. Chenery, 322 U.S. 194 (1947), and *Konigsberg v. California State Bar*, 366 U.S. 36 (1961), involved situations where agencies erred in the first instance by not determining the facts according to the proper rationale or standards. Upon remand, the agencies once again were free to consider the whole record in light of the appropriate standards.

IV. CONCLUSION

It is earnestly submitted that the nature of the instant proceeding permitted the District Court to remand the case to the Commission in a manner whereby further

agency action was limited to formulating the precise nature of relief to be granted the appellee. Under the circumstances, to give force to the administrative procedure act, Title 5 U.S.C.A. 1009(e), which states that a reviewing court ". . . shall (A) compel agency action unlawfully withheld or unreasonably delayed; . . .", the District Court lawfully could limit the remand to the record before the Commission at the time of its previous decision and order. As stated by Professor Louis L. Jaffe, of Harvard Law School, in his treatise *Judicial Control of Administrative Action*, (1965, Little, Brown and Company), the preclusion of further opening or reconsideration of factual issues by an agency may be desirable to (1) permit a terminal point for litigation; (2) protect reliance on what appears to have been decided; and (3) prevent vexatious and issue-by-issue litigation. All of these values were served when the District Court clarified its remand by the Amended Judgment now questioned by the appellants. The appellee respectfully requests the Court affirm the District Court's final order.

Respectfully submitted,

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SASKATCHEWAN MINERALS (SODIUM SULPHATE DIVISION), a Crown Corporation,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

OPPOSITION TO MOTION TO AFFIRM
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

OPPOSITION TO MOTION TO AFFIRM

Preliminary Statement

The Jurisdictional Statements present to the Court the substantial question of an improper remand that would, if allowed to stand, prevent the Interstate Commerce Commission from performing the functions delegated to it by Congress in passing on the merits of a complaint of undue prejudice. Such result is

so repugnant to this Court's delineation of the boundaries of judicial review as to impel the United States, the Commission, and the railroad and shipper intervenors to apply for summary reversal of the judgment of the district court insofar as it would preclude the Commission from further considering the right of the undue prejudice complainant to relief. The court below, in its supplemental opinion, stated: "It is not intended that the Commission receive additional evidence on the right of the plaintiff to be granted such relief." Its amended judgment ordered the matter "remanded to the Commission for further proceedings with instructions to grant relief to the plaintiff". For reasons detailed below (p. 3), no appeal has been taken on the merits of the district court's decision. As in *Arrow Transportation Co. v. Cincinnati, N.O. & T.P.R.*, 379 U.S. 642, the court is asked, without disturbing the ruling below on the merits, to remove the restraint on the Commission's power to re-examine the issue, imposed by the remand. In neither of its opinions did the District Court suggest any reason for departing from the established practice, in the case of ascertained error, of remanding to the Interstate Commerce Commission for further proceedings consistent with the decision of the court. This deficiency is not supplied by the Motion to Affirm; appellee submits neither decisional authority nor persuasive reasons to support the action of the court below in issuing a restrictive remand.

I. Quantum of proof of water competition

In this case the railroad carriers and the supporting shippers proved to the satisfaction of the Commission that the rate differences complained of existed by reason of the threat of water competition which faces the rail carriers at California origins. The court below, dealing item by item with the estimated cost of water competition, dismissed as "speculation" evidence which had satisfied the Commission as to the availability of water service. The district court held that a firm commitment by a water carrier was necessary to prove water competition and that the quotations obtained by the shippers did not suffice. Such a requirement (i.e., evidence of a firm commitment) had not previously been enunciated in a court or commission decision involving undue prejudice. In enumerating the kinds of evidence it deemed necessary to a showing of water competition, the district court cited no other court decisions.

Because the question is one of mixed fact and law of a peculiarly intricate nature, the railroad and shipper appellants have chosen not to appeal the court's formulation of standards for determining when competition is a sufficiently real threat to justify reduced rail rates published to meet it. However, appellants believe they should have an opportunity to meet the evidentiary requirements laid down by the court, and they believe the Commission is entitled, in dealing with the railroad rate structure, to know whether such requirements can be met on the facts of this case.

II. Appellee has addressed its argument to the wrong issue

Appellee misinterprets appellants' position in stating (Motion to Affirm, p. 4) that

> ". . . it is grossly incorrect to suggest a court may never limit the nature or scope of the agency proceeding upon remand . . ."

At no time did appellants suggest that a court, on remand, may *never* limit the nature or scope of future agency proceedings. On the contrary, the statement of the question presented (JS, pp. 2-3) and the description of the issues involved (JS, p. 7) emphasized that the essence of the question presented to the Commission was "whether an undue or unreasonable preference or prejudice exists on the facts of this case". Resolution of this issue requires analysis and weighing of complex transportation conditions such as makes evaluation of these factors a matter within the special competence of the Commission.

III. Cases cited by appellee support appellants' position

In practical effect, all four cases relied on by appellee as authority for restrictive remands are instances where the reviewing courts *requested* further agency action on the merits in order to avoid making decisions properly reserved for agency determination. The action of the reviewing court in these cases was thus consistent with the position of appellants herein. It

is noteworthy that two of the cases cited by appellee (*Ford Motor* and *Morand Brothers*) involve the National Labor Relations Board and statutory provisions for judicial review that are wholly distinguishable from those governing Interstate Commerce Commission orders. 29 U.S.C. Section 160(e) provides that the court, on review of N.L.R.B. action, may modify the agency's decision and that its judgment and decree shall be final (subject to appeal to the higher courts). In *Coppus Engineering Corp.* v. *N.L.R.B.*, 240 F. 2d 564 (C.A. 1—1957) it was held that, where findings of N.L.R.B. are not supported by substantial evidence, the reviewing court has exclusive jurisdiction to make and enter a decree modifying and enforcing as so modified the order of the Board as provided by 29 U.S.C. Section 160(e). An altogether different provision for statutory review of Interstate Commerce Commission orders is found in 28 U.S.C. Section 2321 which describes the authority of the reviewing court as "to enforce, suspend, enjoin, annul or set aside in whole or in part any order of the Interstate Commerce Commission other than for the payment of money . . .".

IV. The Administrative Procedure Act supports appellants' position

Appellee invokes 5 U.S.C. Section 1009(e) in support of the district court's remand, describing this as a case of "agency action unlawfully withheld or unreasonably delayed" (Motion to Affirm, p. 10). But the district court based its decision solely on what it deemed to be a lack of substantial evidence to support

the Commission's findings. This is acknowledged by the appellee who states (Motion to Affirm, p. 7):

> ". . . the only conclusion was that the record . . . did not support the findings necessary to appellants' asserted defense."

The Administrative Procedure Act, in such a case, provides (5 U.S.C. 1009(e)):

> ". . . the reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusion, found to be unsupported by substantial evidence . . ."*

Authority to set aside agency action is manifestly not authority to make new and contrary findings, to decide on the merits an issue entrusted to the agency for determination, or to foreclose the agency's discretionary power to grant further hearings. That Section 1009(e) was not designed to limit the administrative function of the agency is indicated by its legislative history. The Senate report states that this section was

> ". . . not intended to confer any non-judicial functions or to narrow the principle of continuous administrative control enunciated by the Supreme Court in *Pottsville.*" (S. Rep. No. 752, 79th Congress, 1st Session (1945).)

Subsequent case law repels the view that under this section the reviewing court may assume the discretionary authority of the agency. In *J-T Transport Co.* v. *U.S.*, 185 F. Supp. 838 (1960), the three-judge

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* This dovetails perfectly with the statutory provisions defining the scope of judicial review of I.C.C. decisions. 28 U.S.C. 1336, 1398, 2284, 2321-2325.

district court specifically denied that a reviewing court could, under Section 1009(e), compel an agency to effectuate a particular result. The I.C.C. had denied plaintiff's application for motor carrier authority. The court stated:

> "Plaintiff urges that we compel action by the I.C.C. unlawfully withheld upon the application of plaintiff, and requests that we direct the I.C.C. to issue plaintiff a permit authorizing it to perform the transportation recommended by the Examiner. We have no such power. Courts of review have no power to order an administrative body to perform discretionary acts in a particular manner or themselves to exercise administrative functions (citing cases)." (p. 851)

Action withheld may be ordered by the reviewing court, but denial of relief sought does not constitute action unlawfully withheld. *State Airlines, Inc.* v. *CAB,* 174 F. 2d 510 (1949). To hold otherwise would have the effect of nullifying the basic function of the agency and make of it a mere conduit for the purpose of taking evidence, substituting ultimately the judgment of the court for that of the agency.

Conclusion

Appellee, by its Motion to Affirm, would have this Court sanction an unprecedented assumption of power by the reviewing court at the expense of the agency's authority to exercise regulatory powers entrusted to it by the law. In *Arrow Transportation Co.* v. *Cin-*

cinnati N.O.&T.P.R., supra, a case not challenged or distinguished by appellee, this Court prevented such assumption of power. A similar result, it is submitted, should be directed here.

Respectfully submitted,

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Certificate of Service

I, ARTHUR A. ARSHAM, attorney for Stauffer Chemical Company, one of the appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 21st day of October, 1966, I served copies of the foregoing Jurisdictional Statement to the Supreme Court of the United States on the several parties thereto, as follows:

1. On the Interstate Commerce Commission, by mailing a copy, in a duly addressed envelope, with air-mail postage prepaid, to Robert W. Ginnane, its General Counsel, at the offices of the Commission, Washington, D. C. 20423.

2. On Mrs. Betty Jo Christian, Attorney for the Interstate Commerce Commission, who represented the Commission in the appeal for which review is sought herein, by mailing a copy, in a duly addressed envelope, postage prepaid, to the offices of the Commission, Washington, D. C. 20423.

3. On the Solicitor General, by mailing a copy, in a duly addressed envelope, with air-mail postage prepaid, to the Department of Justice, Washington, D. C. 20530.

4. On Saskatchewan Minerals, a Crown corporation, plaintiff in the action and appellee herein, by mailing copies in a duly addressed envelope, with air-mail postage prepaid, to its attorneys of record, Robert Baronsky, Esq., and Wayne W. Wright, Esq., Beresford & Booth, 700 Olympic National Life Building, Seattle, Washington 98104.

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